REPORT OF

MASSACHUSETTS TASK FORCE

ON ACCESS OF

VICTIMS AND WITNESSES

WITH MENTAL RETARDATION

TO THE

CRIMINAL AND CIVIL JUSTICE

SYSTEMS

MAY 1993

June 15, 1993

NOTICE OF INSERT TO APPENDICES

Appendix viii - Training Recommendation to the Department of Mental Retardation was inadvertently printed with only one page of the four page Summary Report of November 30, 1992. Please insert the enclosed three pages after Appendix viii.

Thank you.

Alex L. Moschella
Chairman

III. Recommendations of Task Force

Recommendations which embody the above stated purpose, goals, and guidelines were presented to Commissioner Philip Campbell, D.M.R., on September 10, 1992.

These recommendations outline a comprehensive training initiative which includes the following specific areas:

1. A standard Sexual Abuse Protocol for state and vendor operated programs.

2. A training program using a standard curriculum for all staff.

3. An education and training program for all persons with mental retardation

4. Consultation and training for families and guardians.

5. Requirement of staff and consumer training for program licensing.

6. Quality assurance monitoring of provider agency protocol, staff training, and consumer empowerment in the prevention of and/or reporting of sexual abuse.

7. A requirement in purchase of service contracts for staff and consumer training and a methodology for the prevention of sexual abuse.

8. Outreach to the justice system which will incorporate education, consultation, and ongoing communication designed to promote an understanding of mental retardation, special issues in cases of victimization (sexual abuse), and needs for accommodation of the judicial procedure to assure equal treatment under the law.

IV. Response of Commissioner Philip Campbell

The Commissioner's response dated October 16, 1992 follows:

1. DMR will develop a Standardized Abuse Protocol which will incorporate the issue of sexual abuse for use by both state and vendor-operated programs. The recently created Commissioner's Task Force on Complaint and Investigation Procedures, chaired by the department's Ombudsperson, Jean Tuller, will assume responsibility. This Task Force will submit its' report no later than February 1, 1993.

2. One member of the Training Task Force on Sexual Abuse will be invited to participate on the Task Force on Complaint and Investigation Procedures.

3. DMR will develop a standardized training on prevention of sexual abuse for all staff, including supervisors and direct care staff. This will be incorporated into the department's master training plan to be implemented by the Director of Training. Competencies will be established and staff attendance will be documented.

4. DMR will provide education and training on sexual awareness and self-protection for consumers. This will continue to be done through the ISP process. Efforts will be made through existing channels to emphasize the importance of this need.

5. DMR will support all providers, including the ARC's, in their efforts to provide training for families and guardians.

6. DMR will emphasize the need for service coordinators to encourage and support families when they are dealing with the issue of abuse.

7. DMR will continue to work with the numerous elements of the criminal justice system to develop a sensitivity to the issues of persons with mental retardation through established trainings and other means. This includes work with the District Courts, including judges, Parole and Probation Departments, and municipal police departments through the Criminal Justice Training Academy.

8. The Chief Investigators in each of our Regions will act as liaisons to the police, district attorney's offices, and courts on issues of abuse.

9. Once an Abuse Protocol with mandated staff training has been approved, the Licensing Department will incorporate oversight of this into existing monitoring procedures for which a mechanism is already in place. The mandated training of staff on prevention of sexual abuse will be incorporated into DMR purchase of service system contacts.

10. The training and educational needs of consumers will continue to be documented through the ISP process and monitored by service coordinators. DMR will work on increasing the availability of trained personnel as well as teaching materials and resources.

V. Present Status of Recommendations

Consistent with the need to reach out to the justice system, the training subcommittee, through the efforts of the chairperson, has established contact and ongoing dialogue with the Massachusetts Criminal Justice Training Council to provide resource materials on mental retardation. These materials will be incorporated in the curriculum designed for training police officers statewide.

Also, two members of the training subcommittee serve as liaisons to the District Court Subcommittee on Mental Retardation, chaired by Judge Elliott L. Zide. This subcommittee's goals are:

1) To develop guidelines and procedures for working with offenders with mental retardation from the time of their arrest through summons to sentencing.

2) To develop a training program for probation officers, judges, and court clinicians.

The intent of the district court subcommittee is to develop a strong linkage between the court system and the Department of Mental Retardation.

VI. Future Review of Recommendations

The Subcommittee on Training will continue to meet as necessary to achieve stated goals and fulfill the intent of the Task Force Mission Statement. Of particular interest will be the timely implementation of recommendations as these affect the prevention of sexual abuse and access to the civil and criminal justice systems.

MASSACHUSETTS TASK FORCE

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INTERIM REPORT

MAY 25, 1993

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I. INTRODUCTION BY CHAIRMAN: Part I

The countless unnamed victims of sexual abuse and families who feel further victimized because the system has failed them have inspired this Interim Report.

I am grateful to the members of our Task Force who gave so unselfishly of their time and expertise in spirited deliberation and study over an intensive nine month period.

My valued friend and colleague, Vice-Chairman Joseph Buonomo, eloquently and passionately sets the tone for the submission of this report in his Part II Introduction.

The District Attorney for Middlesex County, Thomas F. Reilly, is to be commended for his courageous leadership and openness to allow the Task Force to reexamine a sensitive case under his jurisdiction that illustrates the scope and dimension of the problem.

The participation and support of Attorney General Scott Harshbarger's Office attests to the statewide concern surrounding the issue of access to our court system for citizens with mental retardation, and the impact of the Americans with Disabilities Act as it is applied to this issue. The Attorney General's continuing concern with the subject matter of this report is further demonstrated by his establishment of the Elder and Disability Issues Task Force.

On March 24, 1993, the Task Force presented this report in draft form to the Senate and House Judiciary Committee and numerous members of the Task Force presented testimony in support of House Bill No. 2044, a copy of which is in the attached appendix. This legislative effort was spearheaded by the outstanding advocacy efforts of Representative Carol Donovan of Woburn. The Task Force recognizes her tremendous support and interest in our work.

I note the contribution, effort and response of the Department of Mental Retardation (DMR) to the Task Force. The DMR through its Commissioner, Philip Campbell, embraced the mission of the Task Force and assumed lead responsibility in the time consuming process

of drafting the legislation which the Task Force revised and endorsed, as well as responded positively to all recommendations made by the Training Subcommittee of the Task Force which are now well on the way to the implementation phase. These efforts and findings are described in this report.

I am especially grateful for the contribution of Patricia Jardim, a law student at Suffolk University Law School. Patricia was a student in the course "Elder and Disability Law & Public Policy" which I teach at Suffolk Law School and her interest in this area led her into the position of Legal Intern for the Task Force. Patricia eagerly accepted this challenge and responsibility. The Task Force is grateful for her excellent efforts.

We have just begun and, in that spirit, welcome the reader's critical comments and involvement.

Alex Moschella, Esq.
Chairman

May 25, 1993

INTRODUCTION BY VICE-CHAIRMAN: Part Two

"A CALL TO ACTION"

After 30 years as a volunteer for the Association for Retarded Citizens (ARC) in almost every capacity, including President of the ARC and two years on the President's Commission on Mental Retardation, I thought that I had enough sophistication and understanding to handle almost any challenge in this field.

Years of second class citizenship forced by society on persons with mental retardation are extremely difficult to endure but we, as their advocates, had hoped and worked for better days and, perhaps, had thought we were meeting with success so that, in time, our advocacy role would diminish.

The many years of advocating for equal justice, equal programs, community acceptance, and human dignity sometimes lulled me into complacency only to be suddenly awakened to discover that our advocacy roles never end.

Past experiences did not prepare us for today's shocking degradation: SEXUAL ABUSE. Witnessing "normal" people have their lives torn apart by sexual abuse, we assume that persons with mental retardation, whose entire lives are entrusted to others, must experience similar trauma when they are abused. This impact becomes more severe if one is not able to testify to the facts in a manner which our society and criminal justice system expects in today's hurried and impatient world.

When a family member is abused, and encounters unsatisfactory actions and frustration at every turn, as outlined in the following case study, it serves as ***A CALL TO ACTION***.

This became the impetus for the Task Force. The many friends, colleagues, professionals and caring individuals representing various state agencies who came together to serve on the Task Force and its subcommittees will hopefully make a difference for other persons with mental retardation so that they and their families can be heard within our system, and witness the full implementation of the Americans with Disabilities Act.

Joseph Buonomo
Vice-Chairman

May 25, 1993

II. A CASE STUDY: "The Unnamed Victims"

* INTRODUCTION *

The following is a true story which is representative of increasing numbers of similar cases involving abuse, the legal profession, and the court system. The case involves the sexual abuse of an adult man who is mentally retarded[1]. A clinician appropriately reported this case to the Disabled Persons Protection Commission (DPPC), which assigned the Department of Mental Retardation (DMR) to investigate the allegations in accordance with the provisions of M.G.L. Chapter 19C. This case later involved the Massachusetts criminal justice system.

In reading this case, the reader should consider whether more and/or better training of the different professionals involved in this case could have made a difference in the process and the outcome. We ask the reader also to examine the issue of the victim's competency, and how the process of reporting, investigating, and preparing the case for prosecution failed to enable him to express himself effectively and therefore failed to protect his rights.

* PETER'S BACKGROUND *

1990. Peter (age 39), Gary, and two other men are living in a four person group home, operated by a private non-profit provider agency (the "provider agency") funded and licensed

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[1]New definition of "Mental Retardation" published by American Association on Mental Retardation (AAMR) August, 1992 - "Mental Retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before age 18."

* All personal names used are fictitious.

by the Massachusetts Department of Mental Retardation (DMR). All four men are mentally retarded, and DMR Service Coordinators (case managers) prepared "individual service plans" for each person. They go to workshops during the day and come home to their residential program nights and weekends. The provider agency hired the supervisors and the group home staff to assist the men with activities of daily living. Their families are involved in the men's lives and are in touch with the provider agency staff on a regular basis. The program is typical of numerous others which are funded and licensed by DMR. The story is told as experienced by Peter's parents.

* PETER'S BEHAVIOR *

Initially, Peter began to exhibit troubling and different behaviors by becoming anxious, aggressive, and withdrawn. He then began to refuse to participate in his normal routine and developed diminished self-control in all settings and, in particular, at the group home. The family and staff from the group home, the workshop, and the transportation company were concerned about the serious deterioration of behavior. They met on several occasions to discuss and respond to Peter's dilemma. Despite these efforts and conversations with Peter's psychologist and psychiatrist, no one could adequately explain the deterioration in Peter's behavior. All proposed interventions were only marginally successful.

Although Peter is able to speak to some extent, he could not express at that time what was troubling him. Residential staff noticed that Peter was having particular difficulty relating to an evening staff person named Dan. When Dan was questioned by his supervisor regarding this issue, Dan's response was that perhaps Peter's difficulties with him were due to his insistence that Peter comply with his routine and that Dan might have been harder on Peter than

other staff members. The provider agency's Clinical Director later called Peter's parents to report that Dan had been observed sexually abusing Gary, one of Peter's housemates in his bedroom at the group home, and that Dan's employment had been terminated. The provider agency reported Gary's abuse to the DPPC, and DMR investigated the report. DMR interviewed Peter in the course of the investigation involving Gary, but he provided no specific information on any abuse that he might have suffered.

*** THE PROVIDER AGENCY'S REACTION ***

The provider agency reacted in several ways. Upon learning of the abuse suffered by Gary, the provider agency arranged a meeting for all involved families with an experienced counselor on sexual abuse matters in order to initiate a "healing process." Fearing that Peter may have witnessed the abuse, the provider agency arranged for a therapist to work with him. Staff appeared to think that Peter was "acting out" because he had witnessed upsetting conduct and because he was very sensitive to the people around him and to his surroundings. At Peter's mother's request, the provider agency looked at better methods to train individuals served and staff. The agency also convened a special meeting of the provider agency's Human Rights Committee, a body required by DMR regulations, which asked how the provider agency could better supervise the program night staff. The program's Clinical Director addressed the committee's request but did not specify how better supervision would be accomplished. Later, the Chair of the Human Rights Committee apologized to the men's families for not having aggressively raised the issue of possible abuse to the other three men in the house, given that the Committee had been told about the abuse perpetrated upon Gary.

* PETER'S RELATIONSHIP WITH HIS THERAPIST *

Peter's relationship developed with the therapist, who was working for the first time with an individual with mental retardation. During one of the initial sessions, while attempting to draw him out and assuming that he had been a witness to Dan's abuse of Gary, she presented Peter with anatomically correct dolls. To her surprise, he clearly said, "This happened to me" and showed that he himself had been abused. Moreover, he identified Dan as the abuser and described how he was violated and where in the residence the abuse occurred. The provider agency filed a second complaint with DPPC and notified Peter's family.

* THE INVESTIGATION *

The DMR investigator assigned to the case referred the matter to the local police and the District Attorney's office. The court had placed Dan on probation after a plea bargain in Gary's case, and he was reporting regularly to his probation officer. Dan had been in therapy for sexual issues, which was unknown to the provider agency when he was hired.

The Assistant District Attorney in charge of the case informed the parents that he intended to have Peter's testimony videotaped in order to secure an indictment from the Grand Jury. Unfortunately, significant delays occurred in the investigation and clinical intervention due to the Assistant District Attorney's involvement in a demanding murder case and the unexpected surgery of the therapist. The videotaping took place in the victim's home in front of several key people. The delay, combined with the frequency of preparing Peter for testifying, may have contributed significantly to his increasingly severe decompensation and to a feeling of responsibility for the abuse inflicted upon him. The parents believe that prompt videotaping behind two way mirrors shortly after the revelation to the therapist would have produced more credible testimony and would have been less traumatic for Peter.

After the videotaping, the District Attorney's Office decided not to seek a grand jury indictment because it determined that Peter could not undergo a competency hearing in front of a judge nor was there sufficient independent evidence, such as eyewitnesses and medical findings, to proceed. As a result, the District Attorney's Office informed the parents that it would be unethical to go forward and prepare for trial.

In response, the DMR investigator recommended that expert consultation/testimony be sought for the purpose of a determination of Peter's competency, but the Assistant District Attorney did not follow this recommendation. Hoping it would help the Assistant District Attorney develop a case against Dan, Peter's mother requested that the provider agency assemble the therapist's notes, including an executive summary of clinical findings by the Clinical Director listing indicators of Peter's being a victim of sexual abuse. However, the District Attorney's Office did not request additional information as to competency due to its determination that there was insufficient independent evidence to proceed with the case. Peter's parents remain concerned that expert consultations on the issue of competency were not sought in this case, and the District Attorney agrees that, in the future, a valuable resource for prosecutors involved in these types of cases should include a determination whether expert consultation is appropriate.

The District Attorney's office attempted to assist Peter and his family through the legal process by appointing a Victim-Witness Advocate. However, she had limited experience in the area of mental retardation, and her communication with the family during the course of the investigation was minimal. The parents felt that the Advocate was reluctant to inform Dan's probation officer about Peter's case and only did so after repeated prompting by Peter's parents. However, unknown to the parents, the District Attorney's Office made efforts to have the Probation Department surrender Dan to the court for violation of his probation conditions. Due

to the fact that this incident with Peter preceded the incident for which Dan had been convicted, no violation was pursued. Also, a DMR attorney who was aware of Peter's case had expressed an interest in testifying at Dan's probation hearing on Gary's case to the issue of Peter, but was advised that comment is not invited at such a hearing. The DMR investigator attended because he was seriously concerned about this case.

* THE IMPACT ON PETER *

During the period of Peter's severe decompensation following the abuse, Peter's therapist concluded that her involvement was counter-productive to his rehabilitation and terminated services within two weeks after the videotaping. Peter was left bereft. Both the provider agency and parents concluded that terminating services so abruptly was unprofessional and violated clinical practice standards for termination of therapy. The provider agency has hired another therapist who continues to focus on Peter's rehabilitation.

Currently in 1993, which is two and one half years after the abuse, Peter's capacity to trust others is reduced, although he is making some progress. He is less outgoing and less buoyant than he used to be. He has suffered through two anniversaries, a time of victim recall of the emotional trauma associated with sexual abuse and has required the support of all concerned. His parents, both longstanding articulate and sophisticated activists at the local, state and national levels in the field of mental retardation, have lost confidence in the ability of the "system" to protect Peter and his friends, to meet their needs, and to protect their rights.

* CRITICAL QUESTIONS RAISED *

The case study raises a number of critical systemic questions which the Task Force focused on:

(1) Should the provider agency have ascertained problems in Dan's background and not hired him in the first place? (A Criminal Offender's Record Information, or "CORI" check, would have revealed any previous criminal convictions.)

(2) Should provider agencies, DMR, and mental retardation professional staff -- from direct care staff to clinical team members and service coordinators, clinical consultants, program managers, investigators, and human rights people -- receive training to better recognize symptoms of sexual abuse in this population? Should persons with mental retardation, parents, and advocates be trained to recognize signs of abuse for earlier detection?

(3) Would a therapist more experienced in eliciting information from persons with mental retardation have detected the sexual abuse earlier?

(4) Should DMR, through the department's investigative process, or DPPC, in the commission's oversight role, have considered all four program residents in the case study "at risk"? What investigatory steps should agencies take to determine other possible victims?

(5) Should the provider agency's Human Rights Committee have been more vigilant and better informed?

(6) Should DMR investigators have special training on interviewing persons with mental retardation? Should there be a special protocol for such interviews?

(7) In order to protect a vulnerable population, should the Probation Department review its existing guidelines to ensure ongoing communication with the District Attorney's office?

(8) Should the District Attorney's office have been more sensitive to the need for timely investigation and prosecution? Should the prosecutors involved have assessed the victim's competency in collaboration with specialists in the field? Should they have better communicated their reasoning to the family and the DMR investigator? Could they have videotaped earlier? Are guidelines needed in the use of clinical notes and executive summaries for purposes of investigation and prosecution? Should alternative forms of testimony in court have been further explored?

(9) Should a judge, with the benefit of an expert's opinion, have made the determination as to Peter's competency?

(10) Should a Victim/Witness advocate have provided the victim and parents with practical advice on how witnesses with mental retardation can be assisted? Should the Victim/Witness Program have special expertise and training in assisting crime victims and witnesses who have mental retardation?

(11) Should DMR and the provider agency be better prepared to deal with the immediate and long range follow-up issues in dealing with the impact/affect of events of abuse, such as prosecution and the healing process, for staff and families as well as for victims and witnesses?

(12) Should a protocol specify the responsibilities of the DMR, the DPPC, provider agencies, victim-witness advocacy programs, and prosecuting authorities in dealing with abuse issues in this population?

The recommendations of the Task Force address these troubling questions and hopefully will stimulate discussion and responses that will lead to a plan of action.

III. THE TASK FORCE: PURPOSE AND ACCESS TO COURTS

In the days of wide-spread institutionalization, persons with mental retardation were neither seen nor heard; in more recent years this isolationism has given way to inclusion with the development of many new community programs and support services. Though persons with mental retardation have become more visible, their access to the courts remains obstructed. The Massachusetts Task Force on Access of Victims and Witnesses with Mental Retardation to the Criminal and Civil Justice Systems ("Task Force") is dedicated to increasing opportunities for citizens with mental retardation to raise their voices and be heard in this important area of public life.

The increasing incidence of sexual abuse of persons with mental retardation is of genuine concern.[2] During the period between January 1, 1991 to November 30, 1992, there were 1,785 alleged cases of physical and sexual abuse of people with mental retardation reported to the DPPC. About half of the cases reported are found to require further investigation, and abuse is substantiated in about half of those cases investigated.[3] The Task Force examined issues associated with this population's vulnerability as victims of crime. Unfortunately, this vulnerability is enhanced by ignorance on the part of caregivers and clinicians as well as flaws in the court system.

Persons with mental retardation are vulnerable to crimes of abuse for a variety of reasons: minimal control over their lives, dependent relationships and emphasis on compliance, fear and/or ignorance of reporting incidents, diminished communication skills and reduced

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[2] President's Committee on Mental Retardation. *Report to the President: Citizens with Mental Retardation and the Criminal Justice System*, U.S. Department of Health and Human Services, Washington (1991).

[3] See APPENDIX for DPPC STATISTICS.

intellectual ability, and a lack of education and training in self protection.[4] This is illustrated by the experience of trained caregivers, is recorded in professional literature, and is reflected in the collective experience of the Task Force members.[5] This problem is exacerbated by the attitude of the general public and professionals, including clinicians and lawyers: our society devalues persons with mental retardation as lacking in credibility - a view which has clouded a just recognition of their abilities and personal worth.

This misperception poses a unique obstacle for the victim in accessing both the criminal and civil justice systems. The court system should be modified to reasonably accommodate the special needs of people with disabilities, including mental retardation -- as required by the landmark 1990 Americans with Disabilities Act[6] which requires all public accommodations and state and local government operations to be fully accessible to people with disabilities. This is also articulated by Article 114 of the Massachusetts Constitution, and Massachusetts General Laws, Chapter 151B, Section 4.

With the full support and approval of Attorney General Scott Harshbarger and Middlesex District Attorney Thomas Reilly, the Task Force convened in July, 1992 to address these issues and make recommendations. The Task Force is comprised of professionals and representatives from the private sector, provider and advocacy organizations, state agencies concerned with the

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[4] President's Committee on Mental Retardation. *Report to the President; Citizens with Mental Retardation and the Criminal Justice System*, U.S. Department of Health and Human Services, Washington (1991).

[5] Id. See also Conley, Ronald W. *The Criminal Justice System and Mental Retardation* (Paul H. Brookes Publishing Co.)

[6] 42 U.S.C. 12101 et seq., P.L. 101-336, 104 Stat. 327. See Appendix for a summary of Titles II and IV, and information regarding the ADA coordinator for the Massachusetts court system.

welfare and quality of life of persons with mental retardation and, notably, the parents of a person with mental retardation who was the victim of a sexual abuse crime.[7]

The Task Force members have concentrated their efforts in two particular areas, **legislation and training**, and have:

1) Proposed legislation regarding alternative procedures for the taking of court testimony of persons with mental retardation.

For the past three years, DMR has filed legislation seeking to authorize alternative methods for taking testimony of individuals with mental retardation. This is one important way to offer "reasonable accommodations" to citizens with this disability. Upon formation of the Task Force, DMR submitted its bill for the Task Force's review and revision, resulting in the bill proposed by the Task Force to the legislature with the support of DMR and others.

2) Drafted a comprehensive education and training program which will focus on the prevention of sexual abuse and other crimes, prompt reporting and follow-up within a standardized protocol, and better communication among the many parties involved in dealing with cases.

Such recommended training is designed to strengthen the mental retardation provider community as well as sensitize the criminal justice system personnel to the special needs of victims with mental retardation.

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[7]See APPENDIX for LIST OF TASK FORCE MEMBERS.

IV. NEED FOR LEGISLATION: OPENING THE DOOR TO THE COURTROOM

* MENTAL RETARDATION IS NOT SYNONYMOUS WITH INCOMPETENCY *

Legislation is needed to alleviate some of the problems faced by persons with mental retardation who have been victims or witnesses of sexual abuse and other crimes and who must testify in a court of law. One such problem is the inaccurate assumption that all persons with mental retardation are incompetent to testify and are not worthy of belief, simply because they are mentally retarded. **In Massachusetts, competence to be a witness involves an ability:**

1) to understand the oath administered to witnesses;

2) to describe what occurred;

3) to know the difference between truth and falsehood; and

4) to recognize that there are punishments for not telling the truth[8]

"Any person of sufficient understanding...may testify in any proceeding, civil or criminal, in Court or before a person who has authority to receive evidence." M.G.L. c. 233, Section 20. (emphasis added).

*** TEST OF COMPETENCY ***

"The ultimate test of the competency of a witness whose mental capacity is below normal, whether by reason of defect or immaturity, is the extent of that person's capacity to observe, remember, and give expression to what he has seen or heard or experienced."[9]

Despite assumptions to the contrary, many persons with mental retardation can meet this

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[8]Commonwealth v. Brusqulis, 398 Mass. 325 (1986); Kenneth Hughes, 19 MASSACHUSETTS PRACTICE SERIES 6, section 121, at 99-103.

[9]Kenneth Hughes, 19 MASSACHUSETTS PRACTICE SERIES 6, section 122. See also Commonwealth v. Teregno, 234 Mass. 56, 124 N.E. 889 (1919).

standard. The practical reality is that limited intelligence may affecttheir *appreciation of the implications of the situation, not their capacity to remember it or effectively describe what happened to them.* For example, Peter in the case study, was able - with the proper clinical assistance - to describe exactly what happened to him.

In Massachusetts, the issue of whether one is competent to testify in court is determined solely by a judge, who has the ability to call for an expert's opinion as to a witness's competency.[10] With this in mind, the Task Force strongly recommends that **the judiciary should seek and utilize evaluations by clinicians, who have the expertise in evaluating the competence of witnesses to testify.**

There are a number of factors relating to competency: (1) a person can be competent in one area but not in others (i.e. a judge may have determined in a guardianship proceeding that a person with mental retardation needs a guardian to make substantive decisions concerning, for example, medical treatment; however, this same individual may have the capacity to be a competent witness in a criminal proceeding); (2) physical or sensory impairments (e.g., speech problems, difficulties in hearing or vision) which may also be present, do not affect intellectual competency; some people who are retarded also have such impairments, while some other people are mistakenly presumed to be retarded simply because others cannot understand them; and (3) many people with mental retardation lack social skills and therefore may seem shy, quiet, or either too compliant or uncooperative when first confronted by an unfamiliar party.

For these and many other reasons, communication with victims with mental retardation will require extra time, skill and attention on the part of interviewers. For example, a witness with mental retardation may benefit from the use of simple words and checking back to be sure

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[10] G.L. c. 233, Section 20. See also Section 19.

that he or she understands a point. **Each case needs to be thoughtfully and carefully considered on its own merits.**

*** PROBLEMS FACED BY VICTIMS IN TESTIFYING ***

Once on the witness stand, victims and witnesses with mental retardation are often intimidated by an imposing, unfamiliar, and often hostile courtroom setting and may experience temporary confusion, fear, or conflict which may result from speaking out against an abuser. The development of procedures which would, by reducing the intimidation involved, allow greater access of persons with mental retardation to the justice system is necessary to enforce their right to have their testimony heard in court. Such procedures are particularly important when the victim might suffer severe trauma from the pressure of testifying and undergoing cross examination in court after having already been a victim or witness to a serious crime.

The Task Force examined G.L. c. 6, Sections 121 and 122, which deal specifically with the issue of competency of witnesses, and reviewed leading case law, such as the case of Commonwealth vs. Bergstrom,[11] which sets forth requirements for the use of electronically preserved testimony that would allow some victims and witnesses to testify outside the presence of a jury, or in a less threatening setting. Following the case law guidelines, the DMR drafted a bill which the Task Force's Legislative subcommittee reviewed and revised.

In December, 1992, The Task Force endorsed the bill entitled **"AN ACT RELATIVE TO ALTERNATIVE PROCEDURES FOR DETERMINING COMPETENCY TO TESTIFY AND FOR TAKING TESTIMONY OF A WITNESS WITH MENTAL RETARDATION."** [12] It would allow, among other things, alternative methods of testifying for victims and witnesses

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[11] 402 Mass. 534 (1988).

[12] See Appendix FOR LEGISLATION SUBMITTED BY TASK FORCE

with mental retardation and would encourage expert witnesses to testify as to the competence of a witness with mental retardation. The Task Force hopes to encourage the support of readers to ensure that it is enacted into law by the General Court in 1993.[13]

* ALTERNATIVE METHODS AND DMR LEGISLATION *

The legislation, drafted by the DMR and reviewed and endorsed by the Task Force, contains only alternative methods which meet the constitutional guidelines articulated by the Supreme Judicial Court in Bergstom. The bill addresses the intimidating atmosphere of the courtroom while preserving a defendant's right of confrontation. By doing so, the bill does not except the witness with mental retardation from the appropriate demands of the system or alter the system to the detriment of others but merely provides simple accommodations without which many individuals with mental retardation are denied the opportunity to be heard. For example: the testimony might be videotaped outside the presence of the jury and then played back to it; a person familiar to the witness might be permitted to stand near the witness to promote a more reassuring atmosphere; or in a bench trial (civil or criminal), testimony might be taken in a non-courtroom setting, such as in the judge's chambers or some other mutually agreeable place. Such techniques are examples of a "reasonable accommodation" to the disability of a victim or witness, consistent with the requirements of the Americans with Disabilities Act.[14]

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[13]See APPENDIX for CO-SPONSORS OF THE BILL.

[14]Discrimination can occur not only by the presence of physical barriers, but also in the manner in which participation in the governmental process is restricted. "In addition to the architectural considerations, the [Transportation Barriers Compliance] Board believes access to information and participation in the governmental process is vitally important to all citizens. In judicial, legislative and regulatory facilities, the taking of testimony, and public debate and deliberation on local issues, laws

In all cases, for an alternative method of testifying to be used, the court must conduct a hearing and find that the usual procedures for testifying in open court would result in severe psychological or emotional trauma to the witness or would cause the witness to suffer a temporary loss of or regression in cognitive or behavioral functioning or communicative abilities such that his or her ability to testify will be significantly impaired.[15]

V. VIDEOTAPING GRAND JURY TESTIMONY: A NEW WAY TO PRESERVE VITAL EVIDENCE

* BACKGROUND *

Currently, the Middlesex County District Attorney's Office is the only prosecutor's office in Massachusetts using videotape presentations before the Grand Jury on a regular basis. The use of videotaped presentations has been effective in child abuse cases and would offer the same advantages in cases involving people with mental retardation. Videotaped presentations have several advantages. They eliminate the need for the victim to appear in person before the Grand Jury. In addition, they are made instantaneously when the victim discloses helpful testimony to a prosecutor or trained interviewer. The videotape is superior to the written transcript that accompanies the typical Grand Jury presentation because the witness' demeanor becomes visible to the defendant and the defendant's attorney during case preparation. Expressive videotapes

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or ordinances is an integral part of that process." 57 Fed. Reg. 60622 (1992).

[15]Massachusetts and other states have attempted legislation in the past to authorize alternative methods (e.g. videotapes, broadcasting the testimony into the courtroom, one-way screen) for eliciting the testimony of child victims in cases involving sexual abuse. The primary concern with these statutory measures has been the infringement on a criminal defendant's constitutional right to confront witnesses. See Coy v. Iowa, 108 S.Ct. 2798 (1988); Commonwealth v. Bergstom, 402 Mass. 534 (1988).

have produced many plea bargains, thus sparing victims and witnesses from court appearances. Finally, the videotape is an excellent tool for refreshing a victim's testimony prior to trial, which occurs years after the abuse and, at a minimum, months after the Grand Jury process ends.

These aspects that make videotaped presentations so effective in child abuse cases apply with equal force to other kinds of criminal cases involving especially vulnerable victims -- for example, cases involving persons with mental retardation, other disabilities, or elders.

As a result, the Task Force would like to see more routine use of videotaped presentations to Grand Juries throughout the Commonwealth in order to secure indictments with the least amount of trauma to the victim. Videotaped presentations have definitely contributed to more favorable outcomes in criminal prosecutions.

*** LEGAL SUPPORT ***

Videotaped presentations are legally sound. Although the procedure has not been explicitly endorsed by an appellate court, it has been affirmed in numerous Superior Court motion sessions in Middlesex County. The Supreme Judicial Court is reviewing this procedure in Commonwealth v. Bishop, Appeal Court 92-P-87, a case for which it recently granted further appellate review.

Affirming the use of videotaped testimony before the Grand Jury would be consistent with prior decisions affirming other forms of testimony. Indeed, it is well settled that hearsay testimony can support an indictment. Mass. R. Crim. P. 4(c); Commonwealth v.. St. Pierre, 377 Mass. 650, 65 (1979) (dismissal of indictment unjustified where grand jurors received hearsay exclusively, even where better evidence was available); Commonwealth v. Freiberg, 405 Mass. 282, 301 (1989). Moreover, videotaped presentations have been approved for use,

under proper circumstances, at trial. Commonwealth v. Bergstrom, 402 Mass. 534 (1988); Commonwealth v. LaValley, 410 Mass. 641, 646 (1991) (presentation of videotaped fresh complaint from victim at trial); Mass. R. Civ. Pro. 30A (permits videotaped depositions for trial).

VI. THE NEED FOR TRAINING: PROFESSIONALS WHO KNOW AS WELL AS CARE

The Task Force's Training Subcommittee examined how to raise the level of consciousness among various care-givers and family members regarding the existence of abuse of persons with mental retardation; how to assure prompt identification and reporting of abuse; how to assure an on-going source of information and resource referral and training responsibility within DMR; and how to promote active response and collaboration between DMR and other agencies and systems, such as the DPPC, the police, and the court system.[16]

In the fall of 1992, the Training Subcommittee presented recommendations to the DMR.[17] The Task Force is pleased that DMR's Commissioner has accepted the training proposals of the Task Force and has begun to develop more substantive training programs for use within the organization. The Training Subcommittee continues to work with the Massachusetts Criminal Justice Training Council to incorporate information on mental retardation, issues of victimization, and clinical considerations into training curricula for police officers.

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[16]The Task Force acknowledges and is mindful that the subject of procedures and responsibility for investigating abuse of persons with mental retardation is a subject of considerable debate and concern as raised by the media, DMR, EOHHS, DPPC, the Office of Quality Assurance, and most recently the Inspector General.

[17] See APPENDIX for SUMMARY RECOMMENDATIONS BY TRAINING SUBCOMMITTEE TO DMR.

VII. SUMMARY AND RECOMMENDATIONS: A PLAN FOR THE FUTURE

Serious problems in the system currently limit persons with mental retardation from equal access to the courts. The problems, which range from caregivers not being properly trained in recognizing the signs and symptoms of abuse to a court system insensitive or ineffective in dealing with the problems inherent in persons with mental retardation testifying in court, were revealed by the case study above, which is - unfortunately - all too typical.

It is the intent of the Task Force to outline and to recommend the necessary steps to alleviate these problems. The Task Force needs the support of all agencies involved, including DMR and other funding, licensing, and regulatory agencies, DPPC, the Executive Office of Health & Human Services, the Attorney General's office, the District Attorneys' offices, and the court system, to promote and facilitate equal access to the judicial process for victims and witnesses with mental retardation. Equally important, the Task Force needs the support of private lawyers and the organized bar, political leaders in the executive and legislative branches, and parents and advocates for persons with mental retardation and other disabilities.

To conclude, the Task Force recommends:

1. Victims and witnesses with mental retardation should not be "presumed" incompetent.

2. Enactment of legislation which would allow persons with mental retardation access to the court system as witnesses. Presently, their competency is questioned and discussed without the consideration of expert testimony. The enactment of the proposed legislation encourages use of expert testimony in determining actual competency to testify and articulates alternative forms of testimony, which increase access of persons with mental retardation to the courtroom.

3. Implementation of a comprehensive training initiative by the DMR for all staff within its agency and private provider agencies with whom it contracts for services, in several key areas related to abuse. These areas include but are not limited to: prevention, awareness of signs and symptoms which may be indicative of abuse, standard procedure

to follow in order to respond effectively and in a timely manner, preserving evidence, and providing emotional support (at the time and thereafter) to the victim and family. DMR and provider agencies should receive prompt notification of any complaints. All allegations of abuse should be promptly investigated by the appropriate agencies.

4. Standard procedures and safeguards in the recruitment of staff. These include: Criminal Offender Record Information (CORI) checks for all department and private provider staff; the establishment of a registry within the Executive Office of Health and Human Services which would indicate if an individual has been charged or dismissed due to mistreatment of a client; and guidelines for screening and checking on potential staff recruits.

5. The establishment of interdisciplinary teams backed up by DMR clinicians and other expert resources to immediately assist D.A.s and Victim-Witness Advocates in assessing and evaluating a victims' competency. There are a number of existing resources which can assist the court in assessing and evaluating a victim's competence to testify. First, there are court clinicians. Second, resources should be available through the Case Management Team of the victim/witness, for example, to provide relevant information as well as current evaluations to the Court; likewise, if there is a question of retardation, a referral for an eligibility evaluation can address this issue as well as provide information to the court. **The resources exist; the challenge is to encourage the Court to access these services.**

6. The development of protocols for Clerk Magistrates to follow in interviewing victims of crime who are known or presumed to be mentally retarded.

7. The development of protocols for Victim/Witness Advocates to follow in interviewing victims of crime who are known or presumed to be mentally retarded.

8. The development of protocols for District Attorney Offices to follow relative to the assessment of competency, access to specialized resources, and ethical issues in deciding to prosecute such cases.

9. The initiation of continuing legal and judicial education for lawyers and judges on competency to testify and reasonable accommodations to victims and witnesses with mental retardation.

If you would like more information on the work of the Task Force, or would like to become involved or offer your support or testimony to the Task Force, please contact the Task Force Chairperson or Vice Chairperson.

** APPENDICES **

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TASK FORCE MISSION STATEMENT

The Formal mission for the Task Force on Access of Victims and Witnesses with Mental Retardation to the Criminal and Civil Justice System is as follows:

TO EXAMINE EXISTING POLICIES, PRACTICES, AND PROCEDURES RELATIVE TO THE CAPACITY AND COMPETENCY OF CITIZENS WITH MENTAL RETARDATION WHO ARE VICTIMS AND WITNESSES OF CRIMES OR ABUSES OF THE PERSON AND PROPERTY TO GAIN ACCESS TO THE CRIMINAL AND CIVIL JUSTICE SYSTEM AND TESTIFY TO CRIMES OR ABUSES. IN ADDITION THE TASK FORCE WILL ADDRESS THE ABILITY AND AWARENESS OF MANDATED REPORTERS AND OTHERS TO REPORT SUCH CRIMES OR ABUSES.

TO FURTHER EXAMINE THE MEDICAL, ETHICAL, LEGAL AND PUBLIC POLICY ISSUES RELATIVE TO THE CAPACITY AND COMPETENCY OF PERSONS WITH MENTAL RETARDATION WHO ARE THE VICTIMS AND WITNESSES OF CRIMES WITH SPECIAL EMPHASIS ON VICTIMS OF SEXUAL ABUSE TO TESTIFY AS TO SUCH CRIMES. THE FOCUS OF THE SPECIAL PROBLEMS RELATED TO SUCH VICTIMS OF SEXUAL ABUSE TESTIFYING WILL BE EXPLORED ON BOTH A STATEWIDE AN NATIONAL BASIS WITH RECOMMENDATIONS TO ADDRESS THE NEED FOR TRAINING.

TO ISSUE AN INTERIM AND FINAL REPORT RELATIVE TO THE FINDINGS AND RECOMMENDATIONS OF THE TASK FORCE THAT A) ENCOMPASS A REVIEW OF PROPOSED LEGISLATION TO ADDRESS THE PROBLEM AS WELL AS THE NEED FOR STATEWIDE TRAINING OF DIRECT CARE AND ADMINISTRATIVE STAFF IN THE IDENTIFICATION OF SEXUAL ABUSE AND PROCEDURES TO BE FOLLOWED

IN SUCH CASES; B) SET FORTH POLICIES, PROCEDURES AND STANDARDS FOR DISTRICT ATTORNEYS' OFFICES, POLICE AND CRIMINAL JUSTICE PERSONNEL INCLUDING CLERK MAGISTRATE AND PROBATION OFFICERS; AND C) IDENTIFY THE NEED FOR TRAINING FOR THE CONSUMER, COMMUNITY PROVIDERS AND OTHER PROFESSIONALS.

THE TASK FORCE INTERIM AND FINAL REPORTS SHALL MAKE RECOMMENDATIONS TO BE SUBMITTED TO THE ATTORNEY GENERAL OF THE COMMONWEALTH AND ALL DISTRICT ATTORNEYS AS WELL AS THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES AND THE DEPARTMENT OF MENTAL RETARDATION AND BE MADE AVAILABLE TO STATEWIDE ADVOCACY GROUPS, AND OTHER AGENCIES WHOSE FOCUS INCLUDES PERSONS WITH MENTAL RETARDATION, AS WELL AS INTERESTED COURT PERSONNEL, THE MEDIA AND THE PUBLIC IN ORDER TO EFFECT A CONCRETE ACTION RESPONSE TO THE PROBLEM AND A STRATEGY FOR PREVENTION.

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Massachusetts General Laws, Chapter 6, "Competency of Witnesses".

Massachusetts General Laws Annotated, Chapter 123, Section 19.

Massachusetts General Laws Annotated, Chapter 233, Section 20.

Massachusetts General Laws Annotated, Chapter 151B, Section 4.

The Constitution of the Commonwealth of Massachusetts, Article CXIV.

Americans with Disabilities Act, 42 U.S.C. 12101 et seq.

DISABLED PERSONS PROTECTION COMMISSION
STATISTICS RE MR CLIENTS

FROM PERIOD 1-1-92 THROUGH 11-30-92:

Total Number of Reports Received:	5,231	
Disability = Mental Retardation:	2,893	(55%)

Abuse allegations by type of allegation:

Sexual	455	(16%)
Physical	1,330	(46%)
Emotional	950	(33%)
Omission	966	(33%)

Screening (to DMR)

4B (DMR or provider caretaker)	1,330
4C (private caretaker)	631

FROM PERIOD 1-1-91 THROUGH 7-1-92:

Total Number of Reports Received:	3,849	
Screened to DMR:	1,911	(50%)
Abuse Indicated:	556	(29%)
Abuse Not Indicated:	1,355	(71%)

The Commonwealth of Massachusetts

IN THE YEAR ONE THOUSAND NINE HUNDRED AND NINETY-THREE

HOUSE # 2044

AN ACT ESTABLISHING ALTERNATIVE PROCEDURES FOR DETERMINING COMPETENCY TO TESTIFY AND FOR TAKING TESTIMONY OF A WITNESS WITH MENTAL RETARDATION.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is to immediately establish alternative procedures for determining competency to testify and for taking testimony of a witness, with mental retardation, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. It is hereby declared that the commonwealth recognizes that people with mental retardation are entitled to the same access to the justice system as provided to all citizens of the commonwealth. The commonwealth recognizes that people with mental retardation are the victims or witnesses of crimes or abuses at least as often as their fellow citizens, and perhaps more often by reason of their disability. The commonwealth also recognizes hat our justice system sometimes unwittingly doubly victimizes them by not taking them seriously, by wrongfully assuming that retardation means stupidity, lack of credibility, or poor memory, or by not offering simple accommodations to enable their comfortable participation, understanding and cooperation in the justice system.

NOTE. — Use ONE side of paper ONLY. DOUBLE SPACE. Insert additional leaves, if necessary.

fully accessible to, and useable by, citizens with mental retardation as it is to all other persons: the American with Disabilities Act (P.L. 101-336); Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112) and Article CXIV of the Constitution of the Commonwealth of Massachusetts. The provisions of this act would promote compliance by the commonwealth with these and other laws protecting the civil rights of individuals with disabilities, by offering mechanisms to afford reasonable accommodation to the particular disability of mental retardation. The availability of such options will reduce the danger that victims or witnesses, who happen to be retarded, will be further victimized by the current system's inability to recognize and honor their rights and needs.

SECTION 2. Chapter 278 of the General Laws is hereby amended by inserting after section 16D the following section.

Section 16E. (a) For the purposes of this section, the following words shall have the following meanings:

"Witness with mental retardation", a witness in a proceeding whom the presiding court has found after hearing, as provided in subsection (b) (1) below, to have mental retardation.

"Mental retardation", substantial limitations in present functioning, manifesting before age eighteen, and characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable skill areas; communication, self-care, home living, social skills, community use, self-direction, health

and safety, functional academics, leisure, and work.

(b) (1) In any judicial proceeding wherein a witness with mental retardation may or will testify, the court on its own motion or on motion of the proponent of the witness with mental retardation, and after a hearing, may order the use of one of the alternative procedures for determining competency to testify or for taking testimony of the witness with mental retardation described below, provided that the court finds at the time of the order, by clear and convincing evidence in the case of a criminal proceeding and by a preponderance of the evidence in the case of a noncriminal proceeding, that the witness with mental retardation is likely, as a result of submitting to usual procedures for determining competency or as a result of testifying in open court, as the case may be, (i) to suffer severe psychological or emotional trauma; or (ii) to suffer a temporary loss of or regression in cognitive or behavioral functioning or communicative abilities, such that his or her ability to testify will be significantly impaired. If the court orders the use of an alternative procedure pursuant to this section, the court shall make and enter specific findings upon the record describing the reasons for such order.

(2) A court that makes findings in accordance with (b) (1) above, may order any of the following suitable alternative procedures for determining the competency to testify or for taking the testimony of the witness with mental retardation:

(i) Taking the testimony of the witness with mental retardation while permitting a person familiar to the witness such as a family member, clinician,

counselor, social worker or friend to sit near or next to him or her.

(ii) Taking the testimony of the witness with mental retardation in court but off the witness stand;

(iii) If the proceeding is a bench proceeding, taking the testimony of the witness with mental retardation in a setting familiar to the witness.

(iv) If the proceeding is a jury trial, videotaping of testimony, out of the presence of the jury or in a location chosen by the court or by agreement of the parties;

(v) The procedure set forth in (i) in combination with (ii), (iii), or (iv).

(c) Testimony taken by a videotape pursuant to an order under paragraph (b) (1) shall be taken in the presence of the judge, counsel for all parties, and such other persons as the court may allow. Counsel shall be given the opportunity to examine or cross-examine the witness with mental retardation to the same extent as would be permitted if ordinary procedures had been followed.

(d) When the proceedings are criminal, the defendant shall have the right to be present during the taking of the testimony, to have an unobstructed view of the witness with mental retardation, and to have the witness' view of the defendant be unobstructed.

(e) An order issued under paragraph (b) (1) that the testimony of the witness with mental retardation be videotaped out of the

presence of the jury shall provide that the videotape be shown in court to the jury in the presence of the judge, the parties, and the parties' counsel. At such courtroom showing, the audio portion of the video shall be entered into the record as would any oral testimony and shall be treated in all respects as oral testimony to the jury.

(f) The videotape or giving of testimony taken by an alternative procedure pursuant to an order issued under paragraph (b) (1) shall be admissible as substantive evidence to the same extent as and in lieu of live testimony by the witness in any proceeding for which the order is issued, or in any related proceeding against the same party when consistent with the interests of justice, provided that such an order is entered or re-entered based on current findings at the time when or within a reasonable time before the videotape or testimony is offered into evidence, and provided, in the case of a related criminal proceeding, that the requirements of paragraph (d) were satisfied when the videotape was recorded or the alternative procedure was used.

(g) Whenever pursuant to an order issued under paragraph (b) (1), testimony is recorded on videotape, the court shall ensure that:

(i) The recording equipment is capable of making an accurate recording and is operated by a competent operator;

(ii) The recording is in color and is taken in well-lit conditions;

(iii) The presence of the presiding judge, the attorneys, the defendant or parties (if in the room), and all other persons present, is stated on the recording;

(iv) The witness with mental retardation is visible at all times, and, to the extent reasonably possible, the recording shows all persons present in the room as a jury would perceive them in open court;

(v) Every voice on the recording is audible and identifiable;

(vi) The recording is accurate, undistorted in picture or sound quality, and has not been altered; and

(vii) Each party is afforded the opportunity to view the recording before it is shown in the courtroom.

(h) The fact that the witness with mental retardation has been found in a court proceeding to be incompetent to make informed decisions of personal, medical or financial nature, or is under a guardianship or conservatorship, shall not preclude the witness from testifying if found competent to testify, and further shall not preclude a determination of competency to testify.

(i) The use of alternative procedures hall not be denied because they may take significantly more time than conventional procedures.

(j) Expert opinion shall be admissible at any hearing held pursuant to this section, including hearings to determine the competency of a witness with mental retardation to testify.

(k) Nothing in this section shall be deemed to prohibit the court from using other appropriate means, consistent with this section and other laws and with the defendant's rights, to protect a witness with mental retardation from trauma during a court proceeding.

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The Honorable Marie Parente
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The Honorable Marc D. Draisen
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The Americans with Disabilities Act
(a summary of major provisions)

Information Prepared by:
U.S. Department of Justice
Civil Rights Division
Coordination and Review Section

Title II. Public Accommodations

- Public accommodations such as restaurants, hotels, theaters, doctor's offices, pharmacies, retail stores, museums, libraries, parks, private schools, and day care centers, may not discriminate on the basis of disability, effective January 26, 1992. Private clubs and religious organizations are exempt.

- Reasonable changes in policies, practices, and procedures must be made to avoid discrimination.

- Auxiliary aids and services must be provided to individuals with vision or hearing impairments or other individuals with disabilities so that they can have an equal opportunity to participate or benefit, unless an undue burden would result.

- Physical barriers in existence facilities must be removed if removal is readily achievable (i.e., easily accomplishable and able to be carried out without much difficulty or expense). If not, alternative methods of providing the services must be offered, if those methods are readily achievable.

- All new construction in public accommodations, as well as in "commercial facilities" such as office buildings, must be accessible. Elevators are generally not required in buildings under three stories or with fewer than 3,000 square feet per floor, unless the building is a shopping center, mall or a professional office of a health care provider.

- Alternations must be accessible. When alterations to primary function areas are made, an accessible path of travel to the altered area (and the bathrooms, telephones, and drinking fountains servicing that area) must be provided to the extent that the added accessibility costs are not disproportionate to the overall cost of the alterations. Elevators are required as described above.

- Entities such as hotels that also offer transportation generally must provide equivalent transportation service to individuals with disabilities. New fixed-route vehicles ordered on or after August 26, 1990, and capable of carrying more that 16 passengers, must be accessible.

- Public accommodations may not discriminate against an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

- Individuals may bring private lawsuits to obtain court orders to stop discrimination, but money damages cannot be awarded.

- Individuals can also file complaints with the Attorney General who may file lawsuits to stop discrimination and obtain money damages and penalties.

Title IV. State and local government operations

- State or local governments may not discriminate against qualified individuals with disabilities. All government facilities, services, and communications must be accessible consistent with the requirements of section 504 of the Rehabilitation Act of 1973.

- Individuals may file complaints with Federal agencies to be designated by the Attorney General or bring private lawsuits.

Call the Courts

According to a public notice from the trial courts of Massachusetts, no courts in the state "discriminate on the basis of disability. Parties, attorneys, employees, job applicants, and members of the public are entitled to access to all court programs, activities, and services without regard to disability."

If you have a question or complaint about court accessibility in the commonwealth, contact Marge Brown, the Americans with Disabilities Act coordinator for the Massachusetts court system. She can be reached at (617)727-6746 (V/TDD), Monday through Friday, 8 a.m. to 4 p.m.

- From "Disability Issues" published by Information Center for Individuals with Disabilities.

Task Force on Issues of Sexual Abuse

SUMMARY REPORT

November 30, 1992

I. Introduction

The Task Force on Issues of Sexual Abuse is the training subcommittee of the larger Task Force on Access of Victims and Witnesses with Mental Retardation to the Criminal and Civil Justice Systems. The mission statement of this larger group is the focus of the training subcommittee's deliberations, activities, and recommendations.

The training subcommittee's membership includes: Joseph A. Buonomo, Chairperson; Janice Weisman, DMR; John Higgins, DMR; Jody Williams, MDDC; Mary Vaeni, DPPC; Michelle Sturtevant, DPPC; Doris O. Buonomo; Gail Grossman, DMR: Neil Lazzara, DMR; Judith Murphy, DMR; and Leo V. Sarkissian, ARC Mass.

The overall purpose of the training subcommittee is the prevention of sexual abuse of individuals with mental retardation. Following are major goals;

* To raise the level of consciousness about the existence of abuse.
* To assure prompt identification and reporting of abuse.
* To assure an ongoing source of information, resources, referral and training responsibility within the Department of Mental Retardation (D.M.R.).
* To promote active response and collaboration between D.M.R. and other agencies.

II. Basic Guidelines for the Prevention of Sexual Abuse

The training subcommittee proposes that the Department of Mental Retardation establish a clear set of guidelines for the prevention of sexual abuse. Guidelines would include but are not limited to:

* An assessment of individual needs regarding sexuality awareness and development, self-image and empowerment, safety and protection, within the Individual Service Plan.
* On-going training based on assessment of need.
* A standardized sexual abuse protocol for every DMR service provider.
* Training for all staff in a standardized curriculum and on recognizing signs and symptoms of abuse and on respecting the rights and dignity of individuals.

TASK FORCE ON ISSUES RELATING TO MENTAL RETARDATION AND COURT TESTIMONY

LEGISLATION SUBCOMMITTEE FINAL REPORT

The legislation proposed by this task force seeks to facilitate the ability of persons with mental retardation to testify in court and thereby promote the interests of justice in proceedings involving such persons. This endeavor responds to a recognition that persons with mental retardation may be more vulnerable to incidents which lead to criminal or civil actions, and also have not had equal access as participants in the justice system.

The legislation has the following key features:

1. Permits use of alternative settings for the taking of testimony which are less intimidating, e.g., taking testimony in judge's chambers or other non-court room setting, allowing another person to stand with the witness during testimony.

2. Encourages using these alternative methods for initial determinations of competency prior to trial.

3. Authorizes the use of expert witnesses regarding the effects of the usual courtroom setting on the person with mental retardation as well on the issue of competency.

4. Provides that the existence of a guardian shall not by itself preclude the taking of testimony from a person with mental retardation.

5. Addresses concerns raised by the Supreme Judicial Court regarding:

   a. defendant's constitutional right to confront witnesses in criminal cases;

   b. standards for quality of videotaped testimony (ability to convey all circumstances and persons present during videotaping);

   c. use of appropriate higher standard of proof to trigger use of alternative methods.

6. The alternative methods of taking testimony may be used when the usual procedures would cause "severe psychological or emotional trauma" or a "temporary loss of or regression in cognitive or behavioral functioning or communicative abilities," such that the ability of the witness to testify would be significantly impaired.

The measure, which had been filed in previous sessions in different form by the Department of Mental Retardation (DMR), was produced by the Massachusetts Task Force on Access by Victims and Witnesses with Mental Retardation to the Civil and Criminal Justice System, a citizen-led task force, with the participation of various state agencies. It was filed in the 1993 session by Rep. Carol A. Donovan as lead sponsor and is co-sponsored by numerous other legislators, a list of which is attached hereto. The bill is also formally supported by the DMR, the Disabled Persons Protection Commission, the Office of the Attorney General, the Middlesex County District Attorney's Office, the Association for Retarded Citizens of Massachusetts, the Disability Law Center, and the Massachusetts Council of Mental Retardation Providers.